



DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Jennifer Smith, M.D.; Decision and Order

On July 8, 2021, a former Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause (hereinafter, OSC) to Jennifer Smith, M.D. (hereinafter, Registrant) of New Hartford, New York. OSC, at 1 and 3. The OSC proposed the revocation of Registrant’s Certificate of Registration No. FS0290875. *Id.* at 1. It alleged that Registrant is “without authority to handle controlled substances in New York, the state in which [she is] registered with DEA” and alleged that her DEA registration must be revoked based on her lack of state authority. *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that on January 28, 2021, the New York State Board for Professional Medical Conduct (hereinafter, the Board) issued a Determination and Order revoking Registrant’s New York medical license, effective February 5, 2021. *Id.* at 1-2. The Board revoked Registrant’s New York medical license following its findings, *inter alia*, that Registrant “failed to comply with the terms of an earlier Consent Order that [she] entered into with the Board on February 15, 2013” and “failed to cooperate with an investigation by the New York State Office of Professional Medical Conduct.” *Id.* at 2.

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a Declaration dated December 21, 2021, a Diversion Investigator (hereinafter, the DI) assigned to the Syracuse Resident Office of DEA’s New York Field Division stated that on or

about July 28, 2021, DEA sent a copy of the OSC to Registrant via certified mail, return receipt requested, and on or about July 31, 2021, Registrant herself signed the return receipt for the OSC. Request for Final Agency Action (hereinafter, RFAA) Exhibit (hereinafter, RFAAX) 3 (DI's Declaration), at 1; *see also* RFAAX 3, Appendix (hereinafter, App.) A (Return Receipt Signed by Registrant) and B.

The Government forwarded its RFAA, along with the evidentiary record, to this office on January 26, 2022. In its RFAA, the Government represents that neither Registrant nor any attorney representing Registrant has requested a hearing or submitted a written statement. RFAA, at 2; RFAAX 3, at 2. The Government requests that Registrant's DEA registration be revoked and that any applications for any other DEA registrations by Registrant be denied based on Registrant's lack of authority to handle controlled substances in New York, the state in which she is registered with the DEA. RFAA, at 5.

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on or about July 31, 2021. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the DI's Declaration, the Government's written representations, and my review of the record, I find that neither Registrant, nor anyone purporting to represent Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

FINDINGS OF FACT

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. FS0290875 at the registered address of 3985 Oneida Street, Suite 204, New Hartford, New York 13413. RFAAX 1 (Certificate of Registration). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules IIN, IIIN,¹ IV and V as a practitioner. *Id.*

The Status of Registrant's State License

On October 16, 2020, the New York State Board for Professional Medical Conduct (hereinafter, the Board) issued a Statement of Charges against Registrant. RFAAX 3, App. C, at 10 and 12. The Statement of Charges alleged that on or about February 12, 2013, Registrant voluntarily entered into a Consent Order with the Board, in which Registrant “did not contest pending professional misconduct charges alleging negligence on more than one occasion in violation of N.Y. Educ. Law § 6530(3) and [failure] to maintain records in violation of N.Y. Educ. Law § 6530(32).” *Id.* at 10. Further, according to the Statement of Charges, the Consent Order stated that Registrant “stipulated that her failure to comply with any conditions of the [Consent Order] [would] constitute misconduct as defined by N.Y. Educ. Law § 6530(29).” *Id.* The Statement of Charges stated that the Consent Order was approved on or about February 15, 2013, and became effective on or about February 26, 2013. *Id.* According to the Statement of Charges, the Consent Order required that Registrant remain in continuous compliance with various state laws and regulations and that Registrant cooperate fully with any administration and enforcement, or investigation by the Office of Professional Medical Conduct (hereinafter, OPMC). *Id.* at 10-11. The Statement of Charges stated that the Consent Order also imposed various penalties, including censure, reprimand, license limitation, and probation. *Id.* at 10. According to the Statement of Charges, Registrant violated the terms of the Consent Order when she: failed to renew her registration with the New York State Education Department after her registration expired at the end of March 2020; failed to update her New York State Physician Profile within the six months prior to the expiration of her registration; failed to fully cooperate

¹ Registrant only is authorized to dispense non-narcotic controlled substances in Schedules II and III.

with an investigation from OPMC; failed to respond to various correspondences from OPMC; failed to provide records requested from OPMC; and failed to schedule and attend an interview with OPMC.² *Id.* at 11. On January 28, 2021, the Board's Order sustained the charge that Registrant committed professional misconduct by violating conditions imposed on her medical license and revoked Registrant's medical license. *Id.* at 3 and 7.

According to New York's online records, of which I take official notice, Registrant's New York medical license is still revoked.³ Office of the Professions Verification Searches, www.op.nysed.gov/opsearches.htm (last visited date of signature of this Order). Accordingly, I find that Registrant is not currently licensed to engage in the practice of medicine in New York, the state in which she is registered with the DEA.

DISCUSSION

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA) "upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances." With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.*, 76 FR

² The Board detailed the grounds in which OPMC had begun to investigate Registrant in its Determination and Order (hereinafter, Order) issued January 28, 2021. *Id.* at 3 and 6-7. According to the Order, OPMC had begun to investigate Registrant because "it had reasonable grounds to believe that [Registrant] was impaired to practice medicine by drugs or a physical and/or psychiatric condition." *Id.* at 6.

³ Under the Administrative Procedure Act, an agency "may take official notice of facts at any stage in a proceeding – even in the final decision." United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by e-mail to the other party and to Office of the Administrator, Drug Enforcement Administration at dea.addo.attorneys@dea.usdoj.gov.

71,371 (2011), *pet. for rev. denied*, 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.*, 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term “practitioner” to mean “a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.” 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner’s registration, Congress directed that “[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.” 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner’s registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper*, 76 FR at 71,371-72; *Sheran Arden Yeates, M.D.*, 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.*, 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.*, 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton*, 43 FR at 27,617.

According to the New York Controlled Substances Act (hereinafter, the Act), “[i]t shall be unlawful for any person to manufacture, sell, prescribe, distribute, dispense, administer, possess, have under his control, abandon, or transport a controlled substance except as expressly allowed by this article.” N.Y. Pub. Health Law § 3304 (McKinney 2022). Further, the Act defines a “practitioner” as “[a] physician . . . or other person licensed, or otherwise permitted to dispense, administer or conduct research with respect to a controlled substance in the course of a licensed professional practice” *Id.* at § 3302(27). Finally, New York regulations state that “[a] prescription for a controlled substance may be issued only by a practitioner who is . . . authorized to prescribe controlled substances pursuant to his licensed professional practice” N.Y. Comp. Codes R. & Regs. tit. 10, 80.64 (2022).

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in New York. As already discussed, a physician must be a licensed practitioner to dispense a controlled substance in New York. Thus, because Registrant lacks authority to practice medicine in New York and, therefore, is not authorized to handle controlled substances in New York, Registrant is not eligible to maintain a DEA registration. Accordingly, I will order that Registrant's DEA registration be revoked.

ORDER

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FS0290875 issued to Jennifer Smith, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Jennifer Smith, M.D. to renew or modify this registration, as well as any other pending application of Jennifer Smith, M.D., for additional registration in New York. This Order is effective [INSERT DATE 30 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Anne Milgram,
Administrator.

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